

1990

Security Title Company of Southern Utah a Utah Corporation, Trustee v. R.D., a Utah Partnership, Steve Sevy, Trustee, and Brian High Development Corporation, a Utah Corporation : Brief of Appellant

Utah Court of Appeals

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Terry L. Wade; Patricia Gubler; Snow, Nuffer, Engstrom & Drake; Attorneys for Appellee.

Michael W. Park; The Park Firm; Attorney for Appellant.

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900534-CA

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

SECURITY TITLE COMPANY OF
SOUTHERN UTAH a Utah
Corporation, Trustee,

Plaintiff,

vs.

R.D., a Utah Partnership,
STEVE SEVY, Trustee, and
BRIAN HIGH DEVELOPMENT
CORPORATION, a Utah
Corporation,

Defendants.

Docket No. 900534-CA
Priority No. 14b

BRIAN HIGH DEVELOPMENT
CORPORATION, a Utah
Corporation,

Appellant,

vs.

R.D., a Utah Partnership,

Appellee.

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY
STATE OF UTAH

THE HONORABLE JUDGE J. PHILIP EVES

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Appellant

FILED

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COURT OF APPEALS

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SOUTHERN UTAH a Utah
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTION OF THE COURT OF APPEALS	1
NATURE OF THE PROCEEDINGS.	2
STATEMENT OF THE ISSUES.	2
DETERMINATIVE STATUTES & RULES	2
STANDARD OF REVIEW	2
STATEMENT OF THE CASE.	3
SUMMARY OF THE ARGUMENT.	7
ARGUMENT	8
<u>POINT I:</u>	8
APPELLEE FAILED TO MEET ITS BURDEN OF SHOWING THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT	8
<u>POINT II</u>	9
THE OFFICE OF STATE ENGINEER HAS NO AUTHORITY TO DETERMINE RIGHTS OF PARTIES	9
<u>POINT III</u>	9
A DECREE OF QUIET TITLE IS NECESSARY TO DETERMINE THE RIGHTS OF THE RESPECTIVE PARTIES	9
CONCLUSION	10
APPENDICES	13

TABLE OF AUTHORITIES

Cases Cited:

<u>Bergen v. Travelers Ins. Co.,</u> 776 P.2d 659 (Utah ct. App. 1989)	2
<u>Daniels Irr. Co. v. Daniel Summit Co.,</u> 571 P.2d 1323 (Utah 1977)	9
<u>Olwell v. Clark,</u> 658 P.2d 585 (Utah 1982)	8
<u>Yardley v. Swapp,</u> 364 P.2d 4 (Utah 1961)	9

Statutory Provisions:

Utah Code Ann. § 78-2a-3(2)(j)(Supp. 1989)1
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CORPORATION, a Utah
Corporation,

Appellant,

vs.

R.D., a Utah Partnership,

Appellee.

BRIEF OF APPELLANT

JURISDICTION OF THE COURT OF APPEALS

This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j). This appeal was originally filed in the Utah Supreme which transferred the case to this Court.

NATURE OF THE PROCEEDINGS

This is an appeal of a Summary Judgment Order and Decree entered by the Honorable Philip Eves of the Fifth District Court in and for Iron County, State of Utah on the 11th day of July, 1990. The court entered Summary Judgment in favor of the Appellee finding Appellant to be in default with respect to an agreement for the purchase of land and water rights from Appellee. The Summary Judgment reconveyed the land and water to Appellee and forfeited payments made by Appellant as liquidated damages.

STATEMENT OF THE ISSUES

1. Whether the court erred in determining that there were no material facts in dispute.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Appellant is not aware of any constitutional provisions, statutes, ordinances or rules determinative of the issues presented in this appeal.

STANDARD OF REVIEW

This is an appeal from summary judgment. Evidence is viewed in the light most favorable to the losing party. The Court is free to reappraise the trial court's legal conclusions. If there is a dispute as to a genuine issue of material fact the summary judgment must be reversed. Bergen v. Travelers Ins. Co., 770 P.2d 659, 662 (Utah Ct. App. 1989).

STATEMENT OF FACTS

Appellant's assignor, Steve Sevy, purchased for \$360,000, 120 acres of land and certain water rights located at the Brian Head ski resort from Appellee. The terms of the sale were embodied in an Agreement and Escrow Instructions. Copies of the Agreement and Escrow Instructions appear in Appendix 1. The included water rights derived from a diligence claim which is set forth in the Agreement. The Agreement also contains a "whereas" clause that sets forth the fact that the purchase is being made for development purposes:

"AND, WHEREAS, SELLER is desirous of selling said unimproved real property to BUYER and BUYER is desirous of purchasing same for development purposes, all upon the terms and conditions hereinafter set forth.

The Agreement provided that after the down payment of \$72,000, buyer would be entitled to receive one acre for each \$3000.00 paid on the principle balance. The Agreement contained no language to provide for the transfer of water rights. Appellant made annual payments of \$75,000.00 in 1981, 1982 and 1983. In April 1984 there was a balance remaining on the contract in the approximate sum of \$135,000.

Thirty-one acres had been deeded to Appellant. No water rights were conveyed.

Appellant and Appellee entered into an agreement to accelerate the payment of the remaining balance. Copy of the agreement appears in Appendix 1.

Appellant refused to make the final payment because of the adverse claims on the water. Appellee demanded that Security Title Company surrender the escrowed documents. The title company, plaintiff in the instant action, commenced an interpleader action due to the conflicting demands of Appellant and Appellee.

The water rights which were included in the sale derived from Water User's Claim No. 1104 that Appellee had acquired. The water rights were held by Security Title as trustee in the purchase by Appellee.

The trial court took judicial notice of two pending suits wherein there were claimants for the water that was included in the Agreement. (Record at 264). A third case was consolidated by the court. (Record at 242). The owners of the land where the principle water source for claim No. 1140, Salt Pile Spring, is located, Gilbert R. Tronier and Madeline Tronier claimed ownership of the water from the spring.

Appellee filed a motion for Summary Judgment which was heard by the court on August 23, 1988. Appellant filed affidavits from David J. Smith and Burton K. Nichols in

opposition to the motion. The court denied the motion stating that "It appears to the Court that there is a question of fact concerning what water is available to the Defendant, Brian High Development Corporation." (Record at 282).

Appellee filed a motion for reconsideration of the motion for summary judgment. Appellant filed an affidavit from David J. Smith in opposition to the motion. The court heard the motion on June 5, 1990. The court denied the motion, stating:

"The Court: Well, I'm going to deny the motion for reconsideration because, frankly, I can't determine from the record exactly what the facts are, and that's what trials are for. So, let's --let's have the trial, and let's get it set."
(Record at 462)

Appellee filed another motion for reconsideration of the denial of the summary judgment motion. The affidavit of Gerald W. Stoker, an employee of the Division of Water Rights, was the only new evidence before the court. His affidavit addresses the effect of a general adjudication suit commenced by the State Water Engineer in 1967. He admits that there is a dispute regarding the water in question, but said that it only affected about two acre feet of water. The affidavit did not take into consideration the claims of the Troniers nor of any of the three suits which had been commenced in Iron County. Attached to the affidavit as Exhibit "E" is a copy of the Pre-trial Order in the general adjudication suit. At page 6 of the Pre-trial

Order (Record at 491) the claims of protestants against the water involved in the instant case is set forth:

b. Protestants assert that the proposed stockwatering rights in the name of Security Title Company under Water Users Claim Nos....462,983, and 984 are improper and incorrect. This protest is based upon the assertion that protestant and Parowan City own all of the water supply in the Center Creek drainage basin and that the proposed stockwatering rights take water which is owned either by protestant or by the city.

SUMMARY OF ARGUMENT

The question of whether the Appellee can deliver the water rights included in the sale agreement remains unresolved. There are adverse claims to the water and there has never been a judicial determination of those claims. The affidavit of Gerald W. Stoker, an employee of the Division of Water Rights, does nothing to negate the claims of the Troniers who claim ownership of almost all of the water that is included in the sale. Troniers' claim is set forth in a pending lawsuit of which the trial court took judicial notice. The general adjudication case also contains protestant claims which challenge the ownership of the water in question. The affidavits of Burton K. Nichols and David J. Smith show that the Appellant considered the water rights to be a substantial portion of the consideration for the agreement between the parties. Their affidavits state that the value of the land without the water rights is less than the \$225,000 which had already been paid on the purchase price. The trial court was correct in its earlier orders denying summary judgment. It erred when it determined that the Stoker affidavit was determinative of the water rights issue.

ARGUMENT

POINT I

APPELLEE FAILED TO MEET ITS BURDEN OF SHOWING THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT

The party moving for summary judgment has the burden of showing that there is no genuine issue as to any material fact. Appellee has not met that burden. In Olwell v. Clark), 658 P.2d 585 (Utah 1982) the Supreme Court noted that summary judgment is proper only if "(a) the pleadings and affidavits, if any, show no issue as to any material fact, and (b) the party is entitled to judgment as a matter of law." Id. at 586. As there are genuine issues of material fact presented in this case the court should have denied the motion for summary judgment as it had done on prior occasions. The Answer To Crossclaim (record at 66) put at issue the validity of the water rights and asked the trial court to make a determination of the respective values of the land and water rights. The affidavits of Nichols and Smith also address the issue of the water rights. Copies of the affidavits appear in Appendix 2.

Perhaps the strongest evidence that the water rights are disputed is the pending lawsuit setting forth the claim of the Troniers. The trial court issued an order in two consolidated cases which involved the Tronier claim. (Record at 241). The order stated that the consolidation was "for purposes of quieting title to Defendants Troniers' claimed water rights." (Record at 242).

POINT II

THE OFFICE OF STATE ENGINEER HAS NO AUTHORITY TO DETERMINE RIGHTS OF PARTIES

Although this case does not involve an administrative decision of the state engineer directly affecting the water rights in this case, because the court in effect accepted the Stoker affidavit as if it was determinative of the water rights issue, Daniels Irr. Co. v. Daniel Summit Co., 571 P.2d 1323 is instructive. In that case the Supreme Court stated as follows:

(4) The law appears to be well-settled that proceedings before the state engineer and appeals therefrom do not constitute adjudications of water rights. Id. at 1324. The court went on to say that the "office of state engineer...has no authority to determine rights of parties." Id. at 1325.

In this case the trial court elevated the affidavit of the employee of the state engineer's office to the status of an adjudication of the water rights.

POINT III

A DECREE OF QUIET TITLE IS NECESSARY TO DETERMINE THE RIGHTS OF THE RESPECTIVE PARTIES TO THE WATER

Appellant under the agreement was entitled to receive marketable title to all that was bargained for-land and water rights. The Supreme Court in Yardley v. Swapp, 364 P.2d 4 (1961) held that where litigants claim interests in a

common water source, and the facts are in dispute, the court should proceed to make a definite declaration of rights.

Citing Yardley, the Court in Daniels stated:

"we do not presume to judge or suggest what the rights of the parties are to the use of the waters in question but remand for the purpose of a determination of those rights and a decree quieting title thereto." Supra at 1325.

The trial court took judicial notice in this case of cases which involved the claims of the Troniers to the water which is described in the Agreement between the parties herein. It issued an order (record 242) for consolidation for the purposes of quieting title to Defendants Troniers' claimed water rights. Appellee is an intervenor in that suit. A judgment in that action is a necessary prelude to determining whether Appellee has any water rights to convey.

And, if it does, whether they are in an amount sufficient to meet the terms of the Agreement with Appellant.


CONCLUSION

The question of whether the Appellee owns any marketable water rights which can be conveyed to Appellant remains unresolved. The trial record contains disputed, material facts which must be presented as evidence before the court

can decide the issue. Appellant requests this Court to remand this case for a trial.

Respectfully submitted this 21st day of March, 1990.


THE PARK FIRM


MICHAEL W. PARK
Attorneys for Defendant
Appellant Brian High
Development Corporation

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF APPELLANT were mailed to the following, postage prepaid, this 22 day of March, 1991.

TERRY L. WADE
PATRICIA GUBLER
SNOW, NUFFER, ENGSTROM & DRAKE
90 East 200 North
P.O. Box 400
St. George, Utah 84771-0400


MICHAEL W. PARK

APPENDIX 1

AGREEMENT

THIS AGREEMENT, made and entered into this 1st day of March, 1980, by and between R. D., a Utah Partnership, hereinafter designated as SELLER, and STEVE SEVY, TRUSTEE, hereinafter designated as BUYER.

WITNESSETH:

WHEREAS, SELLER is the owner of certain unimproved real property situate in the County of Iron, State of Utah, more particularly described as follows:

The Northeast Quarter of the Southwest Quarter; the Southeast Quarter of the Southwest Quarter and the Southwest Quarter of the Southeast Quarter of Section 1, Township 36 South, Range 9 West, Salt Lake Meridian.

EXCEPTING THEREFROM all oil, gas and mineral rights.

Together with all water and water rights appurtenant to, used upon or in connection with said property, except and there is hereby reserved the water from Water Users Claim No. 1104 filed July 3, 1963 with the State Engineer's Office on Spring No. 3, together with an Easement to construct and maintain pipe line over and across the Northwest Quarter of the Southwest Quarter of said Section 1 and twenty (20) gallons per minute of the water from Water Users Claim No. 1104 filed July 3, 1963 with the State Engineer's Office, on Spring No. 1, and an easement to construct and maintain a pipe line over and across the Northwest Quarter of the Southeast Quarter and the North Half of the Southwest Quarter of said Section 1, Township 36 South, Range 9 West, Salt Lake Base and Meridian.

AND WHEREAS, SELLER is desirous of selling said unimproved real property to BUYER and BUYER is desirous of purchasing the same for development purposes, all upon the terms and conditions hereinafter set forth.

NOW THEREFORE, in consideration of the premises, promises and covenants hereinafter provided to be faithfully kept and performed by the respective parties hereto, and other good and valuable considerations, the receipt and sufficiency whereof being hereby acknowledged, it is hereby understood and agreed as follows:

1. SELLER by these presents does hereby sell and BUYER does hereby purchase the property above described for the total purchase price of THREE HUNDRED SIXTY THOUSAND AND NO/100 DOLLARS (\$360,000.00) payable in lawful money of the United States strictly within the following times, to-wit: The sum of SEVENTY-TWO THOUSAND AND NO/100 DOLLARS (\$72,000.00) to be paid concurrent with the execution of this Agreement and the balance of TWO HUNDRED EIGHTY-EIGHT THOUSAND AND NO/100 DOLLARS (\$288,000.00) shall be paid as follows:

The sum of \$75,000.00, or more, on or before March 1, 1981, and the sum of \$75,000.00, or more, annually thereafter until the entire principal balance, together with accrued interest has been paid in full. Said payments are to be applied first to the payment of interest and second to the reduction

of principal. Interest shall be charged from March 1, 1980 on all unpaid portions of the purchase price at the rate of ten per cent (10%) per annum.

2. As a matter of convenience and in order to facilitate the performance of the terms and conditions hereof, the parties hereto agree, simultaneously with the execution and delivery of this Agreement, to establish an Escrow with Security Title Company of Southern Utah, 110 North Main, Cedar City, Utah, and execute and deliver appropriate Escrow Instructions. SELLER shall and hereby agrees to simultaneously herewith execute and deliver to Security Title Company of Southern Utah good and sufficient Deeds conveying said property to Security Title Company of Southern Utah, as Trustee, authorize Trustee to record Deeds, and thereafter convey title by Special Warranty Deed to BUYER or BUYER'S nominee upon BUYER'S compliance with the terms and conditions herein set forth.

3. The parties hereto recognize the fact that BUYER is purchasing said property for the express purpose of developing same. In view of this situation and in order to facilitate and assist the BUYER'S proceeding with the development of said property, it is mutually understood and agreed as follows:

(a) BUYER shall be entitled to receive from Trustee and SELLER hereby agrees and Trustee is hereby instructed to convey to BUYER one acre by Special Warranty Deed for each \$3,000.00 paid by BUYER upon the principal balance due hereunder. Each \$3,000.00 so paid shall apply to annual payments required under Paragraph No. 1 above. It is understood that the \$72,000.00 down-payment shall apply to the last acreage released and in the event of default by the BUYER, said \$72,000.00 shall be forfeited to SELLER, and BUYER shall not be entitled to the release of an acreage in consideration of said down-payment.

(b) BUYER hereby acknowledges the fact that it has been advised by SELLER that SELLER is purchasing said property under a prior Trust Agreement wherein Security Title Company is named and is acting as Trustee. SELLER shall and hereby agrees to pay all of the payments due thereon and further agrees not to allow any delinquency or default to occur in connection therewith. Also, in the event BUYER prepays any of the monies due hereunder SELLER agrees to apply a sufficient portion of said prepayment towards the prepayment of said prior Trust Agreement to the end that at all times the balance of the aforesaid Trust Agreement is less than the balance due hereunder.

4. BUYER shall have the right, at all times during which this Agreement is in force and effect, to enter upon the above described real property or any portion thereof and to subdivide, survey, or plat the same and install roads, curbs, gutters, sidewalks, sewers and other improvements thereon, and do any and all things which BUYER deems necessary or desirable for the development of said real property or any portion thereof for the construction of improvements thereon. SELLER hereby authorizes, empowers, and instructs Security Title Company of Southern Utah, as Trustee, that it will, if requested by BUYER, execute all documents reasonably necessary to annex said property or any portion thereof to an adjacent municipality or any water or sewer district, provided that nothing herein shall require Security Title Company of Southern Utah or SELLER to furnish any bond or other obligation in connection with any such development, or annexation or the installation of any improvements on said real property. SELLER or Security Title Company of Southern Utah shall be under no obligation to incur any expense in connection with the planning, laying out, approval or development of said property and BUYER agrees to hold SELLER and Trustee harmless from any liability in connection with the development.

5. Possession of said premises shall be delivered to BUYER by SELLER on the 1st day of March, 1980. All taxes and assessments levied and assessed upon and against said property for the year 1979 and for all prior years thereto shall be paid by SELLER, and the taxes and assessments levied and assessed upon and against said property for the year 1980 shall be prorated between the parties hereto as of the 1st day of March, 1980, on the basis of taxes assessed thereon for the year 1979. All taxes and assessments levied and assessed thereon after March 1, 1980 shall be paid by BUYER.

6. SELLER hereby agrees as long as this Agreement is in full force and effect not to encumber its interest in and to said property prior to the conveyance to BUYER of acreage as herein provided. BUYER shall and hereby agrees not assign its interest in and to this Agreement without the written consent of the SELLER first had and obtained. SELLER hereby agrees that said consent shall not be unreasonably withheld. In the event any lien of encumbrance shall hereafter accrue against said premises by act or neglect of SELLER, BUYER may at its option pay and discharge the same and receive credit on the amount then remaining to be paid hereunder in the amount of any such payment of payments. In the event BUYER shall default in the payment of any taxes or assessments as herein provided SELLER may at its option pay the same and BUYER in such event agrees to repay SELLER upon demand all such funds so advanced and

Agreement

paid by SELLER together with interest thereon from the date of payment at the rate of ten per cent (10%) per annum until repaid.

7. In the event of a failure to comply with the terms hereof by BUYER to make any payments or payment when same shall become due, SELLER, in addition to all other remedies available in law or in equity shall have the right, upon failure of the BUYER to remedy the default within ten (10) days after written notice, a copy of which shall be delivered to Trustee, to terminate this Agreement and be released from all obligations in law and equity to convey any property not theretofore conveyed by Trustee to BUYER. All payments theretofore made by BUYER shall be forfeited to SELLER as liquidated damages for the non-performance of the Agreement, and the BUYER agrees that SELLER may re-enter and take possession of that portion of said property not theretofore deeded to BUYER together with all improvements and additions made by BUYER thereon, which additions and improvements shall remain with the land and become the property of SELLER. The Trustee shall thereafter re-convey said unconveyed property to SELLER.

8. SELLER and BUYER mutually agree that no more than thirty per cent (30%) of said purchase price may be paid prior to January 1, 1981.

9. SELLER and BUYER each agree that should they default in any of the covenants and agreements contained herein, that the defaulting party shall pay all costs and expenses that may arise from enforcing this Agreement by suit or otherwise, including a reasonable attorney's fee.

10. It is understood and agreed that there are no representations, covenants, or agreements between the parties hereto except as herein specifically set forth.

11. This Agreement shall be binding on the heirs, executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties have duly executed and delivered this Agreement in triplicate the day, month, and year first above written.

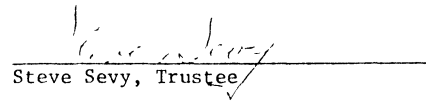
SELLER:

R. D., A Utah Partnership

By: 

By: _____

BUYER:


Steve Sevy, Trustee

ESCROW INSTRUCTIONS

Security Title Company
110 North Main
Cedar City, Utah 84720

Gentlemen:

The undersigned, R. D., a Utah Partnership, hereinafter designated as SELLER, and STEVE SEVY, TRUSTEE, hereinafter designated as BUYER, hand you herewith the following:

1. An Agreement dated the 1st day of March, 1980, by and between the undersigned SELLER and BUYER.
2. A Warranty Deed which conveys to Security Title Company of Southern Utah, as Trustee, for subsequent conveyance to BUYER the property described in that certain Agreement dated the 1st day of March, 1980, deposited herewith as Item No. 1 above.

The purchase price for the real property which is subject to said Agreement is THREE HUNDRED SIXTY THOUSAND AND NO/100 DOLLARS (\$360,000.00) and all payments made by BUYER in discharge of the purchase price for said real property shall be paid to you for the account of SELLER.

Upon payment to you of the amount or amounts set forth in the aforesaid Agreement, you are authorized to issue Deed or Deeds to the respective acreage requested by BUYER in accordance with said Agreement.

BUYER shall be obligated to pay for any improvements installed by BUYER upon said real property during the term of this Agreement, and shall save SELLER or Security Title Company of Southern Utah harmless from all liability by reason of any liens, claims of liens or claims for the value of work done or materials furnished for any improvements.

If default be made in the performance of the terms of the Agreement deposited herewith by BUYER then upon written demand of SELLER, the Agreement deposited herewith shall be returned to SELLER and any unconveyed acreage remaining in the trust with Security Title Company of Southern Utah shall be reconveyed to SELLER. Security Title Company of Southern Utah shall not be required to notify any of the parties hereto, nor determine if default has been made but simply on written demand of SELLER shall comply with the above instructions.

Monies collected by you under said Agreement and these instructions for the account of SELLER shall be deposited by you in a trust account from which you are authorized to deduct your normal escrow fees as hereinafter provided. All remaining funds shall be transmitted by check to SELLER, as directed by separate letter.

Each transmittal of funds to SELLER shall be accompanied by a statement of the current balance owing to SELLER under said Agreement.

Security Title Company of Southern Utah shall be entitled to the following reimbursement for their services:

1. An initial Acceptance Fee for this trust of \$150.00 to be paid one-half by SELLER and one-half by BUYER.
2. An annual fee of \$100.00.
3. A fee of \$15.00 for each parcel conveyed out of trust to be paid one-half by SELLER and one-half by BUYER.
4. Such costs, fees and expenses as may be reasonably incurred for any services rendered in addition to those specifically set forth and provided for as may be required in administrating, enforcing or defending the duties and obligations imposed upon Security Title Company of Southern Utah by these instructions and the Agreement deposited herewith, including a reasonable attorney's fee which shall be paid by the parties whose acts, omissions, or neglect solely precipitate or necessitate the same.
5. An applicable policy of title insurance of Security Title Company of Southern Utah, in the regular form then in use shall be issued in connection with each transaction involving trust property, if the nature of transaction creates an insurable interest, or unless such issuance is specially waived by Trustee.

IN WITNESS WHEREOF, the undersigned SELLER and BUYER have executed the foregoing Escrow Instructions this 1st day of March, 1980.

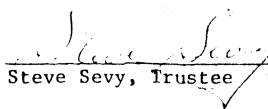
SELLER:

R. D., A Utah Partnership

By: 

By: _____

BUYER:


Steve Sevy, Trustee

ACCEPTED:

SECURITY TITLE COMPANY OF SOUTHERN UTAH

By: 

APPENDIX 2

MICHAEL W. PARK (2516)
ATTORNEY AT LAW
110 North Main, Suite H
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 536-6532

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

SECURITY TITLE COMPANY OF)	
SOUTHERN UTAH, a Utah)	AFFIDAVIT OF
Corporation, Trustee,)	BURTON K. NICHOLS
)	
Plaintiff,)	
)	
vs.)	
)	Civil No. 85-255
R.D., a Utah Partnership;)	
STEVE SEVY, Trustee, and)	
BRIAN HIGH DEVELOPMENT)	
CORPORATION, a Utah)	
Corporation,)	
)	
Defendant.)	

STATE OF UTAH)
 ss.
COUNTY OF IRON)

BURTON K. NICHOLS, after being first duly sworn deposes and says:

1. Affiant is President of Brian Head Enterprises, Inc., a Utah corporation and was such during all times material to the sale of the real estate by Defendant R.D. to Steve Sevy, Trustee.
2. Prior to said sale, Brian Head Enterprises, Inc., had negotiated an option with R.D., to purchase the subject property for the option price of \$360,00.00 to be closed on March 1, 1980.
3. Prior to March 1, 1980 an escrow was established with Plaintiff, Security Title, and on March 1, 1980 the option was

exercised pursuant to its terms; to wit, \$72,000.00 was paid as a down payment and an "Agreement" was signed by the parties, R.D., as Seller and Steve Sevy, Trustee as agent for Brian Head Enterprises, Inc., Buyer. The agreement was prepared by Security Title.

4. I personally negotiated the option with Robert Brayton, one of the partners of R.D. Part of the sale was the water rights which were represented to me to be from Salt Pile Spring and in the amount of 136 acre feet.

5. Brian Head Enterprises, Inc., has bought and sold water rights in the Brian Head area on a number of occasions. At the time of the option it was my opinion that, based on my knowledge of the value of water rights at Brian Head, that 136 acre feet was worth a minimum of \$150,000.00 and, also, that ownership of the water rights from Salt Pile Spring would put the owner in the position of negotiating a beneficial agreement with the Town of Brian Head for development of the property. It was my opinion, based upon my development experience at Brian Head, that ownership of the said water rights was essential to be able to reach a feasible agreement with Brian Head for annexation of the property and its development.

6. While the option was in force, and before March 1, 1980, I sought, as agent of Brian Head Enterprises, Inc., investors to finance the purchase of the said real estate and water rights. Eventually the various investors and Brian Head Enterprises, Inc., formed a new corporation, Brian High Development Corp.,

exchanging their proportionate equities in the real estate and water rights for stock in Brian High.

7. After the formation of Brian High, Steve Savvy, Trustee and agent for Brian Head Enterprises, was instructed to deed his interest to Brian High. Security Title also deeded directly to Brian High, thirty three (33) acres, a portion of which was due the buyer pursuant to the purchase agreement, no water rights were included with the real estate conveyed.


8. It is my opinion, based upon my knowledge of land values at Brian Head, which knowledge is derived from personal ownership and the ownership by Brian Head Enterprises, Inc., of most of the private land at Brian Head, that without water rights the 120 acres purchased from R.D. was at the time of purchase and now, is worth no more than \$1,200.00 per acre or \$144,000.00.

9. Affiant is informed by others that there is still pending a suit over the said water rights claimed to be owned by Troniers, owners of the property where on lies Salt Pile Spring, and, that therefore, R.D., cannot convey water rights pursuant to the agreement.

DATED this 14th day of July, 1988.


BURTON K. NICHOLS

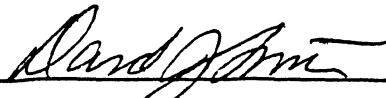
SUBSCRIBED and SWORN to before me this 14th day of July, 1988.


NOTARY PUBLIC
Residing at Cedar City, Utah

My Commission Expires:

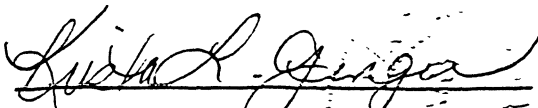
11-1-89

DATED this 29 day of May, 1990.



DAVID J. SMITH

SUBSCRIBED and SWORN to before me this 29th day of May,
1990.



NOTARY PUBLIC
Residing at Madison, Wis.

My Commission Expires: 7/12/92

MICHAEL W. PARK (2516)
ATTORNEY AT LAW
110 N. Main, Suite H
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 586-6532

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

SECURITY TITLE COMPANY OF)	
SOUTHERN UTAH, a Utah)	
Corporation, Trustee,)	
)	AFFIDAVIT OF
Plaintiff,)	BURTON K. NICHOLS
)	
vs.)	
)	
R.D., a Utah partnership;)	
STEVE SEVY, Trustee, and)	
BRIAN HIGH DEVELOPMENT)	Civil No. 85-255
CORPORATION, a Utah)	
Corporation,)	
)	
Defendant.)	

STATE OF UTAH)
 ss.
COUNTY OF IRON)

BURTON K. NICHOLS, after being first duly sworn deposes and says:

1. Affiant is President of Brian Head Enterprises, Inc., one of the shareholders in Brian High Development Corporation, a Utah Corporation.

2. Brian Head Enterprises, Inc., through its agent, Steve Sevy, trustee, made an agreement on March 1, 1980 to purchase approximately 120 acres from R.D., a Utah Partnership. The purchase included the water rights that went with the 120 acres and the purchase price was \$360,000.00. The buyer was given a

right to select 1 acre for each \$3,000.00 paid after the down payment and the down payment was \$72,000.00. The balance on the \$360,000.00 purchase was reduced to \$138,302.20 in 1983. The Buyers are entitled to a release of acres purchased together with a release of the water rights.

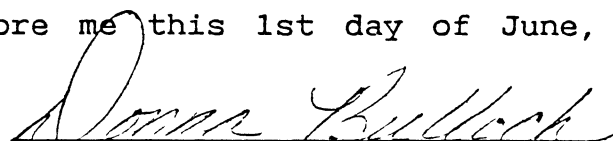
3. At this time the Defendant R.D., a Utah Partnership has not released the necessary acreage in accordance with the payments and has not released any water rights.

4. Affiant has been informed by others that there is a dispute over the water rights and that R.D. cannot convey the water rights as agreed.

DATED this 1st day of June, 1988.

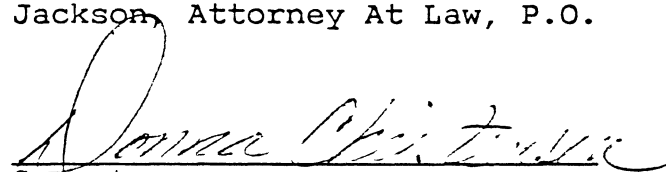

BURTON K. NICHOLS

SUBSCRIBED and SWORN to before me this 1st day of June, 1988.


NOTARY PUBLIC
Residing at Cedar City, Utah
My Commission Expires 11-1-88

MAILING CERTIFICATE

I do hereby certify that on the 1st day of June, 1988, I mailed a true and correct copy of the foregoing, first class, postage prepaid to J. Bryan Jackson, Attorney At Law, P.O. Box 1140, Cedar City, UT 84720.


Secretary

MICHAEL W. PARK (2516)
ATTORNEY AT LAW
110 N. Main, Suite H
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 586-6532

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

SECURITY TITLE COMPANY OF SOUTHERN)
UTAH, a Utah Corporation, Trustee,)
)
Plaintiff,)
)
vs.)
)
R.D., a Utah partnership; STEVE)
SEVY, Trustee, and BRIAN HIGH)
DEVELOPMENT CORPORATION, a Utah)
Corporation,)
)
Defendant.)

AFFIDAVIT OF
DAVID J. SMITH

Civil No. 85-255

STATE OF UTAH)
 ss.
COUNTY OF IRON)

DAVID J. SMITH, after being first duly sworn deposes and says:


1. Affiant was the attorney for Brian High Development Corporation during the initial stages of this lawsuit.

2. On September 4, 1984, affiant sent to Steven E. Snow, attorney for R.D. partnership, a letter addressing the inability of obtaining financing on the property due to the title question relating to water rights; copy of which letter is attached hereto as Exhibit "A".

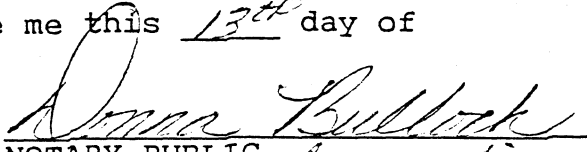
3. Affiants license was suspended¹ the Utah Supreme Court prior to the hearing of this matter and counsel for the Defendant

R.D., a Utah Partnership and counsel for the Plaintiff, Security Title were aware of this fact at the time the Motion for Summary Judgment was heard.

DATED this 13th day of JUNE, 1988.


DAVID J. SMITH

June, 1988. SUBSCRIBED and SWORN to before me this 13th day of


NOTARY PUBLIC

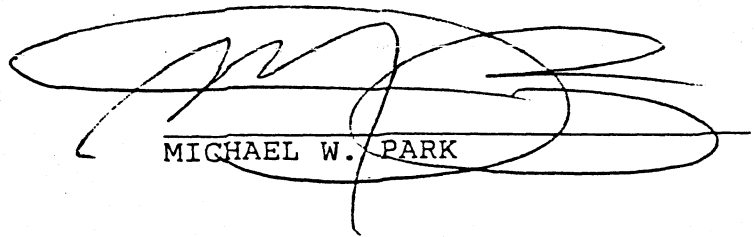
Residing at: Cedar City, Utah

My Commission Expires:

11-1-88

CERTIFICATE OF HAND-DELIVERY

I do hereby certify that on the 14th day of June, 1988, I mailed a true and correct copy of the foregoing AFFIDAVIT OF DAVID J. SMITH, first class, postage prepaid to J. Bryan Jackson, Attorney At Law, P.O. Box 1140, Cedar City, UT 84720 and Terry Wade, SNOW & NUFFER, 90 East 200 North Street, St. George, UT 84770.


MICHAEL W. PARK

David J. Smith

Lawyer
P.O. Box 428
23 East Center Street
Parowan, Utah 84761
(801)477-8201

EXHIBIT A

September 4, 1984

Mr. Steven E. Snow, Attorney
Snow & Nuffer
50 East 100 South, Suite 302
St. George, Utah 84770-0386

Dear Mr. Snow:

Re: R. D. Partnership Real Estate
Agreement

Receipt of your letter of August 15, 1984 is acknowledged. Both Mr. Burt Nichols and myself have had conversations with Robert Brayton with respect to the contract under which the Brian Head acreage is being purchased.

The contract was amended in April by mutual agreement since we were in the process of obtaining financing for the purpose of paying the balance of the contract. We had fully expected to be able to pay the balance of the contract as represented to Mr. Brayton. However, one of the impediments to our accomplishing the refinancing has been the ability to establish that we have equitable title to water rights as was conveyed in the contract from R. D. Partnership. At the time of the contract it was represented that the amount of water conveyed was 136 acre feet. In an attempt to verify that I have conferred with the water engineer in Cedar City and also in Salt Lake City. I was advised that the rights conveyed consisted of 94.08 acre feet pursuant to a diligence on file.

Several months I approached the Town of Brian Head to determine if there might be an interest on the Town's part with respect to acquisition or leasing of the water. I was aware that the Town was going to develop the Salt Pile Spring which is one of the springs that the diligence claim relates. I was advised by the Town Attorney that they were negotiating with the Parowan Reservoir Company for water rights emanating from the same spring.


Several days ago I again talked to the Town Attorney, William Ronnow about the present status of their negotiations. I was advised that the Town had commenced condemnation proceedings on the water. He further advised me that the Town has

conferred with a water rights attorney that is advising the town and have reached an opinion that the water rights that R. D. Partnership is conveying pursuant to the contract are not valid. I am enclosing a copy of the condemnation action for your use. Since the rights which R. D. partnership is conveying to us are not referred to in the Complaint it would appear necessary for R. D. Partnership to enter an appearance in the action in order to prove the validity of the claim.

Since the present value of water at Brian Head has been appraised at \$1350.00 per acre foot, it is apparent that the loss of these water rights would result in damage in excess of the balance owing on the contract.

I would appreciate it if you would advise me of your intended course of action. We of course have a vital interest in securing the water rights, which are of critical importance in the development of the acreage. I will be happy to confer with you at any time and join in the effort to successfully defend the claim.

Sincerely yours, .


David J. Smith

DJS/nls
enclosures

APPENDIX 3

TERRY L. WADE — A 3882
SNOW, NUFFER, ENGSTROM & DRAKE
A Professional Corporation
90 East 200 North
P.O. Box 400
St. George, Utan 84771-0400
801/628-1611
File #144101/bj17

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH

SECURITY TITLE COMPANY OF
SOUTHERN UTAH, a Utah corporation,
Trustee,,

Plaintiff,

vs.

R.D., a Utah partnership; STEVE SEVY,
Trustee, and BRIAN HIGH
DEVELOPMENT CORPORATION, a
Utah corporation, ,

Defendants.

**SUMMARY JUDGMENT ORDER AND
DECREE**

Civil No. 85-255

This matter having been duly and regularly set for hearing on the 19th day of June, 1990, Terry L. Wade appearing for Defendant R.D., a Utah partnership and Michael W. Park appearing for Defendant Brian High Development Corporation, a Utah Corporation, the Court, having heard oral argument from counsel and having considered and reviewed the memoranda of counsel, as well as the pleadings, affidavits, and other material on file with the Court, and having heretofore made and entered its Findings of Fact and Conclusions of Law, and thus being fully advised in the premises and good cause appearing,

IT IS ORDERED, ADJUDGED AND DECREED that the Agreement and Escrow Instructions of March 1, 1980, as amended April 19, 1984, and the terms and

conditions set forth therein are valid and enforceable; that the Defendant, Brian High Development Corporation has failed to make payment as agreed, the same constituting a default pursuant to such agreement; and that the Defendant, Brian High Development Corporation has failed to show and establish any justification or excuse which has not been resolved or dismissed in failing to make such payment and has failed to cure, attempt to cure and does now refuse to cure said default,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Agreement and Escrow Instructions be cancelled and that the premises remaining in trust consisting of the property situated in Iron County, State of Utah, more particularly described below be reconveyed to the Defendant, R. D., and all amounts expended by the Buyer, or his assign, together with all improvements in and to the said premises, shall be forfeited as liquidated damages; that the Defendants, Steve Sevy, Trustee and Brian High Development Corporation and all those who claim or may claim an interest in and to said property by reason of said Agreement and/or Escrow Instructions are hereby barred and estopped from asserting any further claim, right, title or interest in and to said property situated in Iron County, State of Utah, and described as follows:

The Northeast Quarter of the Southwest Quarter; the Southeast Quarter of the Southwest Quarter and the Southwest Quarter of the Southeast Quarter of Section 1, Township 36 South, Range 9 West, Salt Lake Meridian.

EXCEPTING THEREFROM the North 31 acres of the Northeast Quarter of the Southwest Quarter of Section 1, Township 36 South, Range 9 West, Salt Lake Base and Meridian.

SUBJECT TO prior and existing reservations of all oil, gas and mineral rights.

TOGETHER WITH all water and water rights appurtenant to, used upon or in connection with said property, except and there is hereby reserved the water from Water User's Claim No. 1104 filed July 3, 1963, with the State Engineer's Office on Spring No. 3, together with an easement to construct and maintain a pipeline over and across the Northwest Quarter


LEGAL PROOFED

of the Southwest Quarter of said Section 1 and twenty (20) gallons per minute of the water from Water User's Claim No. 1104 filed July 3, 1963, with the State Engineer's Office, on Spring No. 1, and an easement to construct and maintain a pipeline over and across the Northwest Quarter of the Southeast Quarter and the North half of the Southwest Quarter of said Section 1, Township 36 South, Range 9 West, Salt Lake Base and Meridian.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment shall be final as to all claims and causes of action left pending in this action.

MADE AND ENTERED by me, the District Court Judge in and for the Fifth Judicial District Court of Iron County, State of Utah, this 11th day of July, 1990.

BY THE COURT

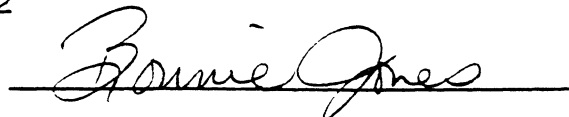

J. PHILIP EVES Judge
Fifth District Court, Iron County

MAILING CERTIFICATE

I hereby certify that on the 28th day of June, 1990, I served an unsigned copy of the foregoing SUMMARY JUDGMENT ORDER AND DECREE on each of the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

J. Bryan Jackson, Esq.
P. O. Box 1140
Cedar City, Utah 84720

Michael W. Park, Esq.
THE PARK FIRM
2 West St. George Blvd., Suite 32
St. George, Utah 84770



MICHAEL W. PARK (2516)
ATTORNEY AT LAW
110 N. Main, Suite H
P.O. Box 765
Cedar City, UT 84720
Telephone: (801) 586-6532

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
IRON COUNTY, STATE OF UTAH

SECURITY TITLE COMPANY OF SOUTHERN)	
UTAH, a Utah Corporation, Trustee,)	
)	
Plaintiff,)	ORDER
)	
vs.)	
)	
R.D., A Utah Partnership; STEVE)	
SEVY, Trustee, and BRIAN HIGH)	
DEVELOPMENT CORPORATION, a Utah)	CIVIL NO. 85-255
Corporation,)	
)	
Defendant.)	

The above entitled matter came on regularly for hearing on the 23rd day of August, 1988 and the Plaintiff, Security Title Company of Southern Utah was represented by its attorney, J. Bryan Jackson and the Defendant, R.D. A Utah Partnership was represented by its attorney, Terry L. Wade and the Defendant Brian High Development Corporation was represented by its attorney, Michael W. Park and the Court having reviewed the affidavits in the file and the memorandums presented and having heard the arguments presented by counsel;


IT IS HEREBY ORDERED that the Motion for Summary Judgment submitted by R.D. A Utah Partnership against Brian High Development Corporation, a Utah Corporation is denied. The contract states that the purchase is for 120 acres of land

(together with all water rights appurtenant thereto or used in connection therewith). It appears to the Court that there is a question of fact concerning what water is available to the Defendant, Brian High Development Corporation.

IT IS FURTHER ORDERED that Brian High Development Corporation has thirty (30) days from the date this order is signed to make an election to rescind the contract or proceed in accordance with the contract or submit a motion to the Court setting forth the reasons why Brian High Development does not need to make such an election.

IT IS FURTHER ORDERED that the Motion for Summary Judgment of R.D., a Utah Partnership against Security Title Company of Southern Utah is denied. It appears to the Court that there is an issue of fact concerning whether Security Title Company of Southern Utah should return all original documents to R.D., a Utah Partnership when a dispute existed between the parties regarding the water rights available to the property and such dispute was communicated to Security Title Company of Southern Utah.

DATED this 7th day of November, 1988.


J. PHILIP EVES
DISTRICT COURT JUDGE